Supreme Court, U.S.
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No. 01-288

In The Supreme Court of the United States

LAS VEGAS SANDS, INC., d/b/a SANDS HOTEL CASINO
PETITIONER,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 226,
BARTENDERS UNION, LOCAL 165;
HARVEY MCCOY; RON BYFORD,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR CERTIORARI

RICHARD G. MCCRACKEN
Counsel of Record
McCracken, Stemerman,
Bowen & Holsberry
1630 S. Commerce Street
Suite A-1
Las Vegas, Nevada 89102
(702) 386-5107

Attorneys for Respondents

ALLIED PRINTING TRADES LABEL COUNCIL SOUTHERN CALIF 133

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QUESTIONS PRESENTED

1. May an employer obtain a credit against its liability under the Worker Adjustment Retraining and Notification ("WARN") Act for severance payments which it was otherwise legally obligated to make?

2. Are tips properly included within "back pay" due under the WARN Act?

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STATEMENT OF THE CASE

Respondents incorporate herein the statement of facts in Section I of the Circuit Court's decision. Respondents provide this additional statement only because obligated by Rule 15.1 to "address any perceived misstatements of fact or law." Sands misstates the facts and law when it claims "Sands had no general obligation to guarantee its tip-earning employees tips or an opportunity to receive tips, and under the collective bargaining agreement between Sands and the union respondents. The regular rate of pay of unionized employees did not include tips." Pet. at 6. Under the identical collective bargaining agreement at other Las Vegas casinos, arbitrators have repeatedly held that the employer may not interfere with tipped employees' ability to earn tips, as the parties were cognizant of the tip income when they negotiated wage scales. Plaintiffs' Supplemental Excerpts of Record, Tab 57. While the contractual term "regular rate" did not include tips, that does not mean that for other purposes tips are not considered part of the employee's regular rate. For example, for each classification and shift the IRS calculated a regular rate of tips on which the employee paid taxes. Reported tips are the sole basis for the relief granted Plaintiffs here. [ER 315-27; PSER 102-60].

Thus even if "back pay . . . at a rate of compensation not less than the . . . regular rate" means (as Sands contends) "back pay . . . at a rate of compensation equal to the regular rate", it was Plaintiffs' contention below that here tips fell within the term "regular rate". Sands' contended otherwise by arguing that because it did not count employees' tips towards the "regular rate" for purposes of the Fair Labor Standards Act, that served to define regular rate here. Under the FLSA, as amended in response to

decisions finding tips to constitute wages,[1] an employer may under certain conditions take a tip credit for up to half its FLSA obligations, but need not do so. 29 USC §203(m).

REASONS FOR DENYING THE WRIT

There is no conflict between courts as to whether lost tips fall within the definition of "back pay" under the WARN Act. Nor is there any conflict over whether an employer can credit against WARN liability the severance payments which the employer contractually bound itself to pay anyway. The only inter-Circuit conflict which Sands can suggest is merely between general attitudes towards the WARN Act: the decision below reads the Act as a make-whole statute, while the Third Circuit reads it as more penal in nature and hence calls for payment each calendar day of violation rather than just each work day. *United Steelworkers v. North Star Steel,* 5 F.3d 39, 41-43 (CA 3 1993), *cert. denied,* 510 U.S. 114, *rehg. denied,* 511 U.S. 1048 (1994). There is no real conflict between the Third Circuit's holding and the decision at bar: a statute can make employees whole and then also impose an added penalty. Moreover, every other Circuit to have considered the calendar-day versus work-day issue has rejected the Third Circuit's view. This Court has repeatedly denied petitions for certiorari to review that issue.[2] It

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[1] *Williams v. Jacksonville Terminals,* 315 U.S. 386 (1942); *Southern Ry v. Black,* 127 F.2d 280 (CA 4 1942).

[2] *Burns v. Stone Forest Industries,* 147 F.3d 1182 (CA 9 1998), *cert. denied,* 525 U.S. 1040 (1998); *Breedlove v. Earthgrains Baking Cos., Inc.,* 140 F.3d 797 (CA 8 1998), *cert. denied,* 525 U.S. 921 (1998); *Frymire v. Ampex Corp.,* 61 F.3d 757, 771-72 (CA 10 1995), *cert. dismissed,* 517 U.S. 1182 (1996); *Saxion v. Titan-C Mfg. Inc.,* 86 F.3d 553 (CA 6 1996); *Carpenters District Council v. Dillard Dept. Stores,* 15 F.3d 1275, 1285 (CA 5 1994), *cert. denied,* 513 U.S. 1126 (1995);

would be illogical to now grant certiorari after denying it all in those prior cases. There is even less reason for this Court to take up the questions of tips and severance pay than there is to review the more-difficult issue of whether a payment is required for each calendar day.

These are not matters of general public importance. It is hard for an employer to ever get in a situation where WARN damages need be computed. First, many (probably most) layoffs and shutdowns are not covered by the Act, as there must be over 50 full-time employees impacted at a single location of an employer with over 100 full-time employees. 29 USC §2101(a). See GAO, "Dislocated Workers: Implementation of the Worker Adjustment and Retraining Notification Act (WARN)" Report T-HRD-93-6 (February 23, 1993)(less than half of shutdowns since Act passed were covered). Second, what the Act requires in these situations is quite simple: sending a notice at least 60 days in advance of closing. 29 USC §2102(a). Third, if the employer fails to give notice, it can rely on several broad exemptions, such as for "seeking capital" or "unforeseeable business circumstances." 29 USC §2102(b). Fourth, even if the employer has no such exemption, it can still be readily rescued by the broad "good faith" clause in 29 USC §2104(a)(4).[3] Finally, the questions involved in this case arise only for the minority

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UMWA v. Martinka Coal Co., 45 F. Supp. 2d 521 (N.D. W. Va. 1999), *aff'd*, 202 F.3d 717 (CA 4 2000); *Kelly v. Sabretech*, 1999 US Dist. LEXIS 15718, 15 IER 461 (S.D. Fla. 1999); *Boilermakers v. Allsteel*, 9 F. Supp. 2d 901 (N.D. Ill. 1998); *Assn v. Western Pulp & Paperworkers v. Grays Harbor Paper Co.*, 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. 1994); *Washington v. Air-Cap Indus.*, 860 F. Supp. 307 (D.S.C. 1994); *Jones v. Kayser-Roth Hosiery*, 748 F. Supp. 1292(E.D. Tenn. 1990).

[3] *See, e.g., Frymire v. Ampex Corp.*, 61 F.3d 757 (CA 10 1995)(holding district court abused its discretion in not reducing liability on good faith grounds); *UAW v. Shadyside Stamping*, 6 IER 1640 (S.D. Ohio

of workers who are tipped or who receive contractually-mandated severance pay without waiving all claims against their former employer.

The decision here cannot be seriously questioned: it has been settled for more than 50 years under numerous federal and state employment laws that "back pay" includes lost tips.[4] Sands misconstrues the WARN Act as defining the damages as merely the regular hourly wage rate. The statute's critical language is instead "back pay for each day of violation at a rate of compensation not less than . . . the regular rate." 29 U.S.C. §2104(a)(1). If

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1991), aff'd, 947 F.2d 946 (CA 6 1991)(relying on good faith to relieve employer of all liability); *OCAW v. Amer. Home Products,* 790 F. Supp. 1441 (N.D. Ind. 1992)(same result).-

[4] *See, e.g., NLRB v. Lee Hotel Corp.,* 13 F.3d 1347 (CA 9 1994); *Club Troika,* 2 NLRB 90, 94 (1936)("In the restaurant trade tips received by a waiter are generally regarded as part of his salary, so that the wage paid by the employer is lower than what would normally, and otherwise, be paid. * * * Consequently, in order that the discharged employees be made whole the term 'back pay' must under these circumstances be regarded as included both the wage paid and the tips received."); *Hilton Int. v. Union de Trabajadores,* 600 F. Supp. 1446, 1451 (D.P.R. 1985) ("We start with the proposition that tips are wages, part of the grievant's compensation as a waiter, and properly included in a back pay award."); *Flores v. Carnival Cruise Lines,* 47 F.3d 1120, 1124-5 (CA 11 1995)(seaman's right to recover wages while unable to work includes the right to tips: "An overwhelming majority of the courts that have considered this question have determined that tip income is recoverable as part of an individual's "average weekly wage" under workers' compensation laws.[citing annotation discussing 50 cases]"); *EEOC v. House of Prime Rib,* 31 FEP (BNA) 981, 983-84 (N.D. Cal. 1983), aff'd, 735 F.2d 1369 (CA 9 1984)(Title VII); *Priest v. Rotary,* 634 F. Supp. 571, 579-80, 585 (N.D. Cal. 1986)(Title VII); *Greenway v. Buffalo Hilton,* 951 F. Supp. 1039, 1062 (W.D.N.Y. 1997)(ADA); *Turic v. Holland Hospitality,* 849 F. Supp. 544, 557 (W.D. Mich. 1994); *EEOC v. FLC & Bros. Rebel,* 663 F. Supp. 864, 869 (W.D. Va. 1987); *Jackson v.McLeod,* 748 F. Supp. 831, 836 (S.D. Ala. 1980).

WARN damages were capped by the regular hourly wage rate, then the many employees who receive primarily sales commissions, tips or piece rates would all be left largely unprotected by WARN. However, even if WARN damages were limited to the "regular rate", here tips were part of the regular rate: the IRS set a regular daily tip rate for all Sands' employees.[5] In *Carpenters v. Dillard Dept. Stores,* 15 F.3d at 1283-84, the Court expressed a make-whole view of WARN's remedial provision which supports the inclusion of tips here:

> Indeed, the Supreme Court has said that "back pay" requires "payment . . . of a sum equal to what [the employees] normally would have earned" had the violation never occurred. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197, 61 S.Ct. 845, 854 (1941). ---- Further, the Supreme Court has explained that "back pay" suggests a remedy such that the damaged employee is restored "as nearly as possible,, to that which would have [been] obtained but for the [violation]." *Id.* at 194, 61 S. Ct. at 852. * * * [T]he legislative history makes it clear that Congress intended the "back pay" language in WARN to connote the traditional back pay remedy as discussed in *Phelps Dodge* [cite].

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[5] There is no reason for this Court to construe "regular rate" as carrying all the statutory and regulatory complications of the Fair Labor Standards Act, under which an employer can choose whether or not to credit tips against part of the minimum wage and hour requirements, but may lose such ability should it fail to give proper notice to employees. 29 USC §203(m). The FLSA and its regulations reflect the fact that it would be very hard as an administrative matter for employers to change each employee's overtime pay rate each week based on the amount of tips received that week. No such administrative burden is posed by the one- time payment required by theWARN Act.

Accord, Saxion v. Titan-C Manufacturing, 86 F.3d at 559 (rejecting argument "that 'back pay', as used in §2104(a)(1)(A), does not mean what it normally means."); *Frymire v. Ampex*, 61 F.3d at 764 ("the WARN remedy of back pay mirrors the type of remedy afforded those who fall victim to an implied contract breach—giving individuals what they would have been entitled to had there been no breach").

Sands' interpretation not only defies the statute's make-whole goal, but also provides much less deterrent effect against failure to give notice. Tipped employees often receive minuscule regular wages. If an employer need not be concerned about WARN liability, then it would rarely have any incentive to give 60 days' notice: giving notice leads employees to "jump ship" to other employers and may cause suppliers and customers to also change how they do business with the employer. For example, here Sands abandoned its "good faith" defense after the Union initiated discovery to confirm that Sands intentionally delayed giving notice until after other new hotels in town had completed most of their hiring. App. 68. The decision below thus properly included "tips" within the back pay award.[6]

[6] Sands alleges the decision below will lead employers of tipped personnel to keep them at work rather than simply paying them for the 60-day period and giving them this time to look for work. However, the Senate rejected a proposed amendment which would have authorized just such a pay-off in lieu of notice. Cong. Rec. June 24, 1999 S8541-43 *(Legislative History of S. 2527* (House Comm. on Educ. & Labor 1990) at 247-50). This amendment was defeated because the bill's proponents wanted to keep employees together still working, for (1) this would likely be the only way another buyer could be located for the plant, particular a buyout by the employees, and (2) this would be the most effective way of create a retraining and job search program: Congress had before it evidence from experts that once employees are laid off and each go their own way, retraining programs are ineffective.

With regard to severance pay, the decision below flowed from clear statutory language: an employer may not take a credit against WARN damages for payments "required by any legal obligation". 29 USC §.2104(a)(2)(B). *See also* 29 USC §2105 (WARN remedies "are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees.") The decision here does not impose any interference with the bargaining process under the NLRA, nor

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Id. at 133 (Bonior: "What we are trying to do is prevent plant closings. What we are trying to do is allow people to get together with ESOP's and into community involvement."); 148 (Williams discusses the studies of retraining); 151, 156 (Conte discusses same); 161 (Walgren: "by setting out time to explore alternatives, to attract new owners, or to negotiate a worker buyout."); 165-66 (Kleczka about encouraging employee buyouts); 250-51 (Metzenbaum denounces proposed amendment because "the bill is about notice. It is not a mandatory severance bill . . . .As stated by the National Academy of Sciences, certainly an impartial objective body, it is the notice that is essential to successful worker adjustment programs. * * * That is what a top General Motors executive said recently. . . . To quote his words: ' If we can get to people early we will involve about 85 percent of them in our retraining program, but once they are laid off, we only get 10 to 15 percent.' What he is saying is, we have to have them together in the plant in order to get across to them what can be done for retraining and how they can go out and find another job. We are not seeking to get workers paid because their plant is closing. We are trying to get them retrained. We are trying to put them back into the mainstream of the job market. If we wait to tell people they are losing their jobs until the day of the job loss, then according to the top executive of General Motors, 75 percent will drift away without every getting counseled or trained for a new job."); 254 ("This amendment is unfair to employees, as well as employers. * * * The employees are going to be anxious to get the money. They are not going to be thinking about job training and counseling. * * * There is a tendency on the part of many people: Just get the buck. Get the money. ['Gosh, if I can get 2 months pay, that would be far better for me. I am not worrying about counseling or training. I just want the money.['] I think that is hurtful to the whole economic picture in the country.").

impose an unfair burden on employers. All employers need do in order to credit severance pay against WARN backpay is to be "up front" in negotiations that they want such a credit. In other words, employers with concerns about WARN liability can do what employers nowadays routinely do anyway when they discharge employees: make severance pay conditional upon the employee waiving his or her legal rights against the employer.[7] What Sands really wants here is a waiver through silence, an approach this Court has repeatedly rejected in requiring any employee waivers of statutory rights instead be "clear and unmistakable". *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998); *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994); *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983).

Thus, the decision below does not create a conflict with employers' NLRA obligations: they do not have to offer severance pay, but if they do, they can make their offer conditional on this pay being credited against any WARN liability. Sands misrepresents the NLRA when it contends that the employer is faced with the Hobson's choice of unlawfully refusing to bargain or giving up any offset right by bargaining to agreement. *See NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 45 (1937) ("The [National Labor Relations] Act does not compel agreements between employers and employees"); *Nordstrom, Inc.*, 229 NLRB 601, 601-2 (1977) (permissible for employer to reduce its money offer if union will not agree to the portion of employer proposal seeking relief on non- mandatory subjects of bargaining, such as waiving

[7] As to non-bargaining-unit employees, Sands could also have done what employers nowadays routinely do in announcing benefits in their personnel manuals: disclaim any contractual intent, indicating those benefits were intended but were not guaranteed.

employee rights).[8]

The WARN Act says "required by any legal obligation," not—as Sands would have it—"any legal obligation preexisting the date WARN notice was due." This Court will not read a qualifier into a remedial statute's broad language absent strong evidence that Congress intended such a qualifier, evidence which is lacking here. Here, Sands promised extra money to employees in part to keep them from "jumping ship" and thus make it easier for Sands to keep the hotel operating profitably until closure. There is no policy reason to judicially rewrite a statutory scheme for simplified damages calculation so as to relieve the employer of liability on account of pay due employees anyway as a matter of contract law.

The decision below is supported by the National Labor Relations Board decision in *Times Herald Printing Co.*, 315 NLRB 700, 702, 147 LRRM (BNA) 1281, 1283-84 (1994), rejecting an employer's effort to deduct WARN payments from the money due as a result of the employer's unlawful failure to engage in effects bargaining concerning the closure:

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[8] WARN's legislative history confirms that labor and management were expected to bargain offsets. Senator Jeffords (one of the principal authors) stated "if employers and employees have bargained for other benefits, they would generally be in addition to the penalties provided under this bill. I think this is proper, but I expect that collective bargaining agreements in the next few years will be adjusted to take this legislation into account." Cong. Rec. July 13, 1988 at H5510 (reprinted in *Legislative History of S2527* (House Comm. On Educ. & Labor, 1990 at 158).

In reaching this conclusion, we rely primarily on the plain language of the WARN statute itself. Section 6 of WARN, 29 U.S.C. §2105, states as follows:

> The rights and remedies provided to employees by this Act are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this Act shall run concurrently with any period of notification required by contract or by any other statute.

Thus, the explicit language of the statute makes clear that the Respondent's obligations under WARN "are in addition to, and not in lieu of" the Respondent's remedial obligations under the NLRA, and that WARN remedies "do not alter or affect" NLRA remedies. It is difficult to see how Congress could have made its intent any plainer: WARN payments do not offset payments required by other federal labor laws, such as the NLRA. There is nothing to the contrary in the WARN statute or its legislative history.

Consistent with this interpretation, Section 5(a)(2)(B) of WARN, 29 USC §2104(a)(2)(B), provides that an employer's WARN liability may be reduced by any voluntary and unconditional payment to an employee "that is not required by any legal obligation." Backpay paid to an employee pursuant to a Board order 13 would, of course, constitute a payment "required by a legal obligation." Thus, amounts paid pursuant to a *Transmarine* remedy would not reduce an employer's liability under WARN. In sum, there is

> an apparent symmetry in the WARN statute: under Section 6, WARN payments do not offset *Transmarine* payments, and under Section 5(a)(2)(B), *Transmarine* payments do not offset WARN payments. * * * [B]oth WARN payments and *Transmarine* payments are necessary if the status quo ante is to be restored and the Respondent's employees are to be made whole for the losses they incurred. The WARN payments remedy the Respondent's violation of its obligation to give advance notice of its decision to cease operations. The *Transmarine* payments remedy the Respondent's violation of its obligation to allow for meaningful bargaining over the effects of its decision to cease operations. Under the judge's decision, the employees are compensated for the notice violation but they receive nothing for the effects bargaining violation. This loss is significant because effects bargaining can result in such additional benefits as pension fund payments, health insurance coverage and conversion rights, preferential hiring at other employer plants, and reference letters for jobs with other employers. *See First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 681-82 (1981).

Thus the Circuit Court decision here flows from established precedent without conflicting with any other court decision. The decision below adheres to plain statutory language. It reaches a result consistent with the statutory purposes. There is no reason for this Court to grant the writ.

CONCLUSION

Sands' petition for certiorari should be denied.

Respectfully submitted,

Richard G. McCracken
McCRACKEN, STEMERMAN, BOWEN & HOLSBERRY
1630 S. Commerce Street, Suite A-1
Las Vegas, Nevada 89102
(702) 386-5107

Attorneys for Respondents